IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 19.02.2007

Coram:-

The Hon'ble Mr. Justice P.SATHASIVAM
and
The Hon'ble Mr. Justice N.PAUL VASANTHAKUMAR

C.M.A. No.1021 of 2004

1. Basha Alias Syeed
Dawood Saheb

2. Shajahan alias Syed
Murthuza Shah Saheb ... Appellants
(1st and 2nd Respondent
2nd and 3rd Petitioner
64th & 65 Defendant)

vs.

1. Babu alias Syed Zahiruddin
also called Syed Jama Baksh
Ali Sha Sarguru, hereditary
Trustee and Mutavalli of
Old Qberstan Wakf,
Trichirapalli-8.

2. Chan alias Syed Akbar Ali ... Respondents
(Appellant & 3rd Respondent
14th & 8th Respondent)

Appeal against the Judgment and decree of I Additional District Judge, Trichirapalli, dated 24.12.2003, in A.S. No.99 of 2002, reversing and setting aside the Judgment and decree of I Additional Subordinate Judge, Trichirapalli, dated 11.03.2002, in I.A. No.735 of 1996 in O.S. No.305 of 1951.

For Appellant : Mr.S.Parthasarathy,
Senior Counsel for Ms.S.Bhuvaneswari

For Respondent No.1 : Mr.V.Raghavachari

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(Judgment of the Court, delivered by P.SATHASIVAM, J.)

Respondents 1 and 2 in A.S. No.99 of 2002 on the file of the I Additional District Judge (P.C.R), Trichy, aggrieved by the order of remand dated 24.12.2003, have preferred the above Appeal under Order XLIII Rule 1(a) of C.P.C.

2. Heard Mr.S.Parthasarathy, learned Senior Counsel for the appellants and Mr.V.Raghavachari, learned counsel for the respondents.

3. The only point for consideration in this Appeal is as to whether the lower appellate court is justified in remitting the matter back to the trial court for fresh disposal by appointing the same commissioner to visit the suit properties with the assistance of a qualified Engineer; and for passing final decree in accordance with law and in the light of the observations made in its Judgment.

4. Aggrieved by the order of the I Additional Sub Judge, Trichy, dated 11.03.2002, passed in I.A. No.735 of 1996 in O.S. No.305 of 1951, Babu alias Syed Zahiruddin - 1st respondent herein and 14th respondent in the said I.A. filed an Appeal in A.S. No.99 of 2002 before the I Additional District Judge, Trichy. His main grievance before the lower appellate court is that the trial court committed an error in passing final decree solely relying upon the joint memo filed by some of the sharers, ignoring his objections. It was projected before the lower appellate court that the trial court erred in dismissing the petitions in I.A. Nos.720 and 1032 of 2001. It was also contended that the trial court, before accepting the joint memo, ought to have followed the procedure contemplated under Order XXXII Rule 7 CPC. It was further projected that the division suggested by the Commissioner is not in accordance with convenient enjoyment.

5. It is not in dispute that, in O.S. No.305 of 1951 on the file of the Sub Court, Trichy, preliminary decree was passed on 31.07.1954. The appeal filed against the preliminary decree was confirmed in A.S. No.670 of 1954 by this Court. Thereafter, defendants 63 to 65 filed I.A. No.735 of 1996 to pass a final decree for partition as per the preliminary decree, whereupon, the trial court passed final decree on 11.03.2002. Against the said final decree for partition, 14th respondent in the Interim Application before the trial court alone had filed A.S. No.99 of 2002 before the Additional District Court, Trichy. The lower appellate court adduced the following reasons for accepting the contention of the appellant and remitting the matter back to the trial court.

(i) value of the buildings had not been fixed;

(ii) In order to fix the value, assistance of a qualified engineer is very much necessary;

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(iii) Since minors are also parties, before recording the joint memo, leave of the Court ought to have been obtained;

(iv) Pathway has to be provided to the sharers;

(v) Consent of the appellant/14th respondent was not obtained in the Joint Memo;

(vi) No reason has been stated for not acting upon the report of the Commissioner.

6. Mr.S.Parthasarathy, learned Senior Counsel for the appellants, by drawing our attention to the relevant provisions and available materials, contended that, taking note of the long pendency of the matter, even if there is any error or defect in the final decree passed by the trial court, it is but proper on the part of the lower appellate court to have passed an order after getting fresh report from the trial court and there is no need to remit the matter back. He also contended that, in view of the fact that the appeal in A.S. No.99 of 2002 was filed only by the 14th respondent and that other parties to the final decree proceedings neither joined him in the appeal nor filed separate appeal against the same, the Appeal is not maintainable. On the other hand, Mr.V.Raghavachari, disputing the contentions raised by the learned Senior Counsel for the appellant, pointed out that the objection regarding maintainability was not raised before the lower appellate court and even after amendment of the C.P.C., in view of the infirmities pointed out by the lower appellate court in the final decree, there is nothing to interfere with its well considered judgment in remanding the matter; and prayed for dismissal of the appeal.

7. Regarding the first objection as to the maintainability of the appeal (A.S. No.99 of 2002), as rightly pointed out by Mr.V.Raghavachari, the same was not raised before the lower appellate court. Accordingly, the present objection as to the maintainability is only an after thought and there is no substance in the same. Even otherwise, any sharer, who is aggrieved of the final decree proceedings, can very well challenge the same before the appellate court. Accordingly, we reject the first objection.

8. Coming to the merits of the order, a close verification of the final decree shows that the same had been passed on the basis of the joint memo. In this regard, it is pointed out that the appellant before the lower appellate court ie., 14th respondent, and also some of the parties/sharers did not sign the joint memo; thereby, it is clear that their consent was not obtained. In view of the same, the final decree passed on such defective joint memo cannot be accepted. It is also not clear from the final decree proceedings as to whether relief was granted by the court in order to decide the share of the minors. Further, in the absence of fixation of value of the buildings, site and superstructure, the Commissioner's Report cannot be accepted. The Commissioner himself

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had expressed difficulty in fixing the value of the buildings and he pointed out that assistance of a qualified engineer is a must. These relevant aspects were not considered by the trial court while passing final decree.

9. Though the learned Senior Counsel, by relying on various decisions, contended that it would be possible for the lower appellate court to call for a report from the trial court and dispose of the appeal; in the light of the infirmities mentioned above and pointed out by the lower appellate court, we are of the view that, in order to afford reasonable opportunity to all the parties, the matter has to go before the trial court for passing fresh orders in the final decree application after rectifying all the infirmities/defects. The infirmities pointed out by the lower appellate court cannot be rectified at the appellate stage. In the above circumstances, we are of the view that there is no need to refer all the decisions relied on by the learned Senior Counsel for the appellant. We are in agreement with the conclusion arrived at by the lower appellate court in remanding the matter back to the trial court. Accordingly, we confirm the order of remand passed by the lower appellate court. Consequently, the appeal fails and the same is dismissed. In view of the fact that the suit for partition was initiated in the year 1951, we direct the trial court to pass a fresh final decree as directed by the lower appellate court within a period of six months from the date of receipt of copy of this order. All the parties to the proceedings are directed to co-operate for passing final decree within the time-frame as mentioned above.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

JI.

To

1. I Addl. District Judge, Trichy.
2. I Addl. Subordinate Judge, Trichy.

1 cc To Mr.V.Raghavachari, Advocate, SR.9776.
1 cc To Mrs.Bhuvaneswari, Advocate, SR.10367.
1 cc To M/s.Sarvabhuaman Associates, Advocate, SR.10368.

CMA No.1021/2004.

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